No. 10,931

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., Individually and as Collector of Customs for the Port of Los Angeles, Customs Collections District No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

SUPPLEMENTAL BRIEF FOR APPELLANT.

By order, entered January 22, 1946, the Court directed the parties herein to file supplemental briefs addressed to the question of whether or not the district court had jurisdiction in view of the fact that since *Erie R.R. Co. v. Tompkins,* 304 U. S. 64 (1938), any personal liability of the appellant collector must be created by California and not by federal law.

SUMMARY OF ARGUMENT.

Appellee appears to concede that, despite the allegations of the complaint, this action is not brought against the appellant collector in his official capacity but against him individually and solely on account of the commission of what it asserts is his private and personal wrong at common law. Under the *Erie* rule such liability must now be found in the law of California and not in the exceptional federal rule of *De Lima v. Bidwell,* 182 U. S. 1, 174 (1901), which previous to the *Erie* case was applicable under *Downes v. Bidwell,* 182 U. S. 244, 248 (1901).

Since, however, California law does not impose liability on a revenue officer who collects a tax in good faith and pays it over to the Treasury, there can be no occasion in the case at bar to decide any question which depends upon the construction to be given a federal statute. There can, therefore, be no jurisdiction in the district court.

When this Court discovers the absence of federal jurisdiction in the district court its duty under section 37 of the Judicial Code (28 U.S.C. 80) is to direct the district court to dismiss the action.

I.

SINCE ERIE R. R. CO v. TOMPKINS THERE CAN BE NO FEDERAL JURISDICTION OF AN ACTION AGAINST APPELLANT UNLESS THE QUESTION OF HIS LIABILITY REQUIRES DECISION OF A CONTROVERSY REGARDING THE INTERPRETATION OF A FEDERAL STATUTE.

It is elementary that a suit against a federal officer in his official capacity is a suit against the United States itself and is not maintainable in the absence of statutory authorization. No authority exists for suit against a Collector of Customs officially but only for suit against the United States under the Tucker Act in the district court or the Court of Claims. *Rankin-Gilmour & Co. v. Newton,* 270 Fed. 332 (1920, S.D. N.Y.); cf. *Dooley v. United States,* 182 U. S. 222, 226 (1901). And then only after exhaustion of any applicable administrative remedies. Cf. *Patchogue-Plymouth Mill Corp. v. Durling,* 101 F. (2d) 41 (1939, C.C.A. 2); see Appt's. Br. 10-14. Indeed, appellee (Br. 4-5) appears to concede that, despite the allegations against the appellant collector in his official capacity which are found in its complaint, this suit is not brought against the collector as an official under federal law, but solely against him as an individual in his private capacity and on account of alleged personal wrongs done under color of office.[1]

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[1]Compare, however, the views of Frank, Ct. J. in *Hammond-Knowlton v. United States,* 121 F. (2d) 192 (1941, C.C.A. 2), cert. den. 314 U.S. 694. It must be kept in mind that the two aspects of liability are distinct and subject to non-apposite procedures. *Toledo Ry. & Light Co. v. McMaken,* 17 F. Supp. 338, 346 (1926, N.D. Ohio).

But the *Erie* case declares that there is no federal law of tort applicable to such personal wrongs.[2] If then, as conceded by appellee, the liability of the appellant collector is founded solely upon some unjustified personal and tortious invasion of appellee's rights by the appellant, the source of that liabilitiy must be the law of California and not the exceptional federal rule of *De Lima v. Bidwell,* 182 U. S. 1, 174 (1901), upon which appellee states it relies. (Br. 5-6.)

Prior to the *Erie* case it had been settled by *Downes v. Bidwell,* 182 U. S. 244, 248 (1901), decided the same day as *De Lima's* case, that suits for personal wrongs, brought against the collector individually under the exceptional federal rule of *De Lima's* case, came within the original jurisdiction of the district court. In *Downes'* case the court held that the provisions which are now sections 24 (5) and 33 of the Judicial Code (28 U.S.C. 41(5) and 76) are *in pari materia* and should be construed together to give the district court original jurisdiction of cases, which, like the present, involve a suit against the collector in his private capacity for alleged personal wrongs done under color of his office. Said the Court (182 U. S. at 248):

> The exception to the jurisdiction of the court is not well taken. By Rev. Stat. sec. 629, subdivision 4, the Circuit Courts are vested with jurisdiction "of all suits at law or equity arising under any act providing for a revenue from imports or tonnage," irrespective of the amount involved. This section should be construed in connection with

[2] *Standard Oil Co. v. United States,* decided February 14, 1946, by this Court.

> sec. 643, which provides for the removal from state courts to Circuit Courts of the United States of suits against revenue officers "on account of any act done under color of his office, or of any such (revenue) law, or on account of any right, title or authority claimed by such officer or other person under any such law." Both these sections are taken from the act of March 2, 1833, c. 57, 4 Stat. 632, commonly known as the Force Bill, and are evidently intended to include all actions against customs officers acting under color of their office. While, as we have held in *De Lima v. Bidwell,* actions against the collector to recover back duties assessed upon non-importable property are not "customs cases" in the sense of the Administractive Act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of section 629, since they are for acts done by a collector under color of his office.

Since the *Erie* case, however, a contrary result has been reached in the case of judicial officers sued in their private capacities for alleged personal wrongs committed under color of office and *Downes'* case has been disregarded. *Viles v. Symes,* 129 F. (2d) 828, 831 (1942, C.C.A. 10), cert. den. 317 U. S. 633, 711. It would seem, indeed, that *Downes'* case is incompatible with the *Erie* rule, by which an alleged personal wrong done under color of office cannot of itself present a question arising under federal law and involving original jurisdiction of the district court.[3] The *Erie* rule

[3]Cf. *Bell v. Hood,* 150 F. (2d) 96, 99 (1945, C.C.A. 9).

requires a plaintiff to establish *first,* that local law imposes liability upon the federal officer in the event that he in fact did violate the federal law, and only then, *second* that a question arising under the constitution and laws of the United States and involving their interpretation is presented.[4] Accordingly, in the case at bar, unless appellee by pleading and proof shall establish a cause of action against the appellant collector in his individual capacity by California law there can be no federal jurisdiction.

II.

THE CASE AT BAR CANNOT REQUIRE THE DECISION OF A QUESTION REGARDING THE INTERPRETATION OF A FEDERAL STATUTE BECAUSE UNDER CALIFORNIA LAW APPELLANT IS IN NO EVENT PERSONALLY LIABLE.

Assuming, *arguendo,* appellee's contention that the decision of the Director of the Bureau of Marine Inspection and Navigation, rejecting appellee's protest against payment of the long-voyage rate, was contrary to the federal statute; assuming also that the appellant collector should have recognized the error of the decision and refused to obey his superior; still California law does not follow the exceptional rule of

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[4] *Rankin-Gilmour & Co. v. Newton*, 270 Fed. 332 (1920, S.D. N.Y.); *Davidson v. Rafferty*, 34 F. (2d) 700, 702 (1929, E.D. N.Y.), aff'd 39 F. (2d) p. 1022; *Johnson v. Thomas*, 16 F. Supp. 1013, 1018 (1936, N.D .Tex.); cf. *Bell v. Hood*, supra. Accordingly, in a case where no question under federal law is involved, the absence of any defendant sued in an official capacity requires dismissal. *Thomason v. Works Projects Administration*, 138 F. (2d) 342 (1943, C.C.A. 9).

De Lima's case and does not impose liability on the appellant collector if he does obey in such circumstances. In California the historic rule of *Cary v. Curtis,* 3 How. 236 (1845), is still the law. By *Hartford Fire Ins. Co. v. Jordan,* 168 Cal. 270, 142 Pac. 839 (1914); *Sheehan v. Board of Police Commissioners,* 188 Cal. 525, 532, 206 Pac. 70 (1922), and *Spencer v. Los Angeles,* 180 Cal. 103, 116, 179 Pac. 163 (1919), it is settled and established that where, under duress of law, a taxpayer pays a revenue officer who is required to pay over the money to the Treasurer, no suit will lie against the officer personally. Performance of the statutory duty to pay over is presumed and the retention of the money by the officer must be expressly pleaded. *Craig v. Boone,* 146 Cal. 718, 81 Pac. 22 (1905). The California rule is well summarized in *Phelan v. San Francisco,* 120 Cal. 1, 5, 52 Pac. 38 (1898), where the Court said:

> It was the duty of the tax collector, however, to pay this money into the treasury imediately upon its receipt, irrespective of the fact that it was paid to him under protest * * * and he was not absolved from this obligation by reason of the protest and notice of the plaintiff. Having paid the money into the treasury in obedience to this official duty, it would violate all principles of justice to hold him individually liable to the plaintiff therefor, upon the ground that he had refused to follow the plaintiff's directions to disregard his official obligation.

See also *Welsbach Co. v. California,* 206 Cal. 556, 561, 275 Pac. 436 (1929); see 21 *Cal. Jur.,* pp. 903-904.

But not only was appellant's payment over a complete defense under California law, appellee has also failed to plead or prove either duress or protest. The complaint herein (R. 4-5) alleges neither duress nor protest. The record is as barren as the pleadings of any offered proof in this regard. Although in brief and argument appellee seeks to make much of the fact that it might have been put under duress by the denial of clearance or by the institution of proceedings for penalty against its shipmaster or for forfeiture against its vessel, this can avail nothing against the silence of the record.

Moreover, under California law there is no duress involved unless payment of the tax by the plaintiff will deprive him of the right to raise some defense as to the illegality of its imposition. As the Court observed in *Phelan v. San Francisco,* supra (120 Cal. at 5):

> In order to constitute a payment under duress, there must be some coercion or compulsion which controls the conduct of the party making the payment—some threatened exercise of power or authority over his person or property, which can be avoided only by making the payment. If one pays an illegal demand with full knowledge of its illegality, his protest does not take from the payment its voluntary character, unless the payment is necessary in order to protect his person or property. The payment of a tax to prevent a threatened sale of real estate is not compulsory, unless the conveyance by the officer will have the effect to deprive the owner of some defense to the

tax, or throw upon him the burden of showing its illegality.

Indeed, the law generally is that, where a taxpayer has another means of making his defense and asserting the illegality of the tax there is no duress. *Christ Church Hospital v. Philadelphia County,* 24 Pa. 229 (1855), error dism. 20 How. 26; *McGee v. Salem,* 149 Mass. 238, 21 N. E. 386 (1889); *Canfield Salt & Lumber Co. v. Manistee Twp.,* 100 Mich. 466, 59 N. W. 164 (1894).

In the case at bar appellee undeniably had the right to assert any claim of illegality open to it under the statutes as a defense to any penalty or forfeiture proceeding which might be commenced against its shipmaster or vessel. Moreover, it had available the course, which it actually chose, of making payment, taking its administrative appeal and, if unsuccessful on its appeal, of then bringing suit against the United States under the Tucker Act and there asserting any claim of illegality open to it under the statutes.[5] It was not open to it under California law, however, to charge the appellant collector with individual wrong in obeying the mandates of his superiors and the injunction of the statutes.

In these circumstances appellee's pleading and proof fail under California law to make a case which required the district court to determine the correct in-

[5]*Social Security Board v. Niertko,* decided February 25, 1946, U.S.C. No. 318 (Slip Opinion, p. 8); *Estep v. United States,* decided February 4, 1946, U.S.C. No. 292 (Slip Opinion, p. 4).

terpretation of the federal revenue statutes referred to in the complaint. There is, therefore, no question "arising under any law providing for revenue from imports or tonnage" which could be presented and the district court plainly had no jurisdiction of the case.

III.

WHERE NO SUBSTANTIAL QUESTION OF FEDERAL LAW IS RAISED BY THE RECORD IT IS THE DUTY OF THIS COURT TO ORDER THE ACTION DISMISSED.

The failure of the parties to insist on the absence of general federal jurisdiction does not waive the want of original jurisdiction in the district court. Under section 37 of the Judicial Code (28 U.S.C. 80), it is the duty of this Court to order the dismissal of a suit at any time it may be discovered that it does not truly and substantially involve a dispute or controversy properly within the district court's jurisdiction. *Hare v. Birkenfield,* 181 Fed. 825 (1910, C.C.A. 9); *Royal Ins. Co. v. Stoddard,* 201 Fed. 915 (1912, C.C.A. 8).

In the case at bar the pleadings and proof having failed to show any liability of appellant to appellee under California law, no question of federal law is presented which can sustain the jurisdiction of the district court in the absence of diversity of citizen-

ship. It is, accordingly, the duty of this Court to remand the case with directions to dismiss.

Dated, March 14, 1946.

Respectfully submitted,

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